IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR.

J U D G M E N T

Mahesh & Others vs. Kanwar Lal & Ors.

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S.B. Civil First Appeal No.329/2002 under Section 96 C.P.C. against the judgment and decree dated 09.10.1998 passed by Shri Ashok Sharma RHJS, District Judge, Jhalawar in Civil Suit No.36/1987 dismissing the suit of the plaintiff appellants filed for pre-emption.

Date of Judgment :::::: October 13, 2006

PRESENT

HON'BLE MR.JUSTICE KHEM CHAND SHARMA

Mr.N.K.Joshi along with
Mr.Sanjay Joshi for the appellants.

Mr.V.K.Tambolia for the respondents.

BY THE COURT (ORAL):-

The office has reported that the appeal is time barred

by 1328 days. An application under Section 5 of the Limitation Act has been filed along with the appeal for condonation of this delay supported by the affidavit of Shri N.K.Joshi, learned counsel for the appellants.

Mr.N.K.Joshi, learned counsel for the appellants submitted that appellant No.4 Santosh son of Ratan Lal contacted him in the month of October,1998 along with the requisite papers for filing the appeal. The appellant also brought the letter dated 24.10.1998 of Shri Laxman Thakur, Advocate of Jhalawar in his name. Mr.Joshi further contended that the appeal was drafted and typed and the same was presented in the registry of this Court in the first week of November,1998 by Shri Prakash Chand Sharma, his Clerk. At that time, his Clerk was accompanied by appellant No.4. He further contended that appellants were under bonafide belief that as they had engaged counsel of their confidance, their interest would be safe. Therefore, they remained silent. However, for sufficient time when they did not heard regarding the fate of their appeal, appellant No.4 contacted in his office and inquired about progress in the appeal then he instructed his clerk to get the appeal listed. The Clerk along with the appellant then searched for the appeal but the same could not be traced. In such circumstances, the instant appeal along with an

application under Section 5 of the Limitation Act has been filed. On this strength, learned counsel for the appellants prayed for condonation of delay in filing the appeal.

Respondent No.1 has disputed the facts mentioned in the application under Section 5 of the Limitation Act by filing reply but the learned counsel for the respondent. However, he has no serious objection, if the delay in filing the appeal is condoned.

In the above circumstances, looking to the limited controversy involved in the appeal, learned counsel appearing for the respondents has not seriously opposed the application under Section 5 of the Limitation Act. The application is, therefore, allowed and the delay in filing the appeal is condoned.

Heard learned counsel for the parties for admission of the appeal.

The facts in brief giving rise to this appeal are that the plaintiff appellants filed a suit for pre-emption. It was mentioned that the house No.1245/2 situated in Ward No.10 of Sunel Tehsil Pidawa, District Jhalawar belongs to Smt. Kamla Bai. The house is double storied. It was

mentioned that towards the southern side of the house of Kamla Bai, the house of the plaintiffs is situated in which they are living. As per the averments in the plaint, there exists one common passage and staircase between the two houses. The stairecase is connected with the roofs of both the potions and the same is being used by both the parties for going to the roofs of their respective portions. It was mentioned that the passage is also being used by the plaintiffs. It was mentioned that the defendant Kamla Bai sold the house to defendant No.1 Kanwar Lal. Before selling the house, defendant Kamla Bai neither gave any notice to the plaintiffs under Section 8 of the ***Pre-emption Act, 1966*** (for short `the Act') nor gave any chance to them for purchasing the house. It was mentioned that as both the portions are connected by one common passage and staircase, they are having a right of pre-emption. It was then mentioned that they are ready to pay Rs.48,000/- and the expenses of the registry. On these facts, the plaintiffs prayed for a decree for pre-emption.

In the written statement, defendant No.1 Kanwar Lal has admitted the fact of selling the property in dispute to him and the fact that the disputed property is a common property of houses and shops. It was mentioned that in the

ground floor, an hotel was running for last 15 years and earlier to it Bhawani Shankar Kumawat was running his tailoring shop. Thus, it was submitted that the property is not a residential property but it is a shop. As per the case of the defendant, the property was not being used for residential purposes for last 30 years. Regarding the ground floor it was mentioned that it is neither a room nor a Barahmda but the same is a shop in which hotel is being run. There is neither any kitchen nor latrin or bathroom in the disputed property. The case of the defendant inter-alia is that Kamla Bai time and again asked Ram Narayana to purchase the property but he refused to do so and on his refusal defendant Kamla Bai sold the property to him.

Learned trial court after framing issues, on 31.10.1991 passed ex parte decree in favour of the plaintiffs appellants.

It seems that against this judgment and decree of the trial court, the defendant-respondents filed S.B.Civil Misc.Appeal No.369/1995 which was allowed with certain directions and the case was remanded back to the trial court for fresh decision after giving opportunity to the parties to examine witnesses and to cross-examine the same.

Thereafter, the learned trial court proceeded to record evidence of the parties. In support of their case, plaintiffs examined three witnesses namely PW.1 Santosh Kumar, PW.2 Balaram and PW.3 Nand Kishore. From the side of the defendants four witnesses namely DW.1 Kanwar Lal, DW.2 Jagannath, DW.3 Bhagwati Prasad and DW.4 Ram Chandra were examined.

After recording evidence of the parties and hearing both the side, the learned trial court vide impugned judgment dated 9th October, 1998 dismissed the suit of the plaintiffs. Hence, this appeal.

Heard learned counsel for the parties.

Learned counsel for the appellant has contended that the learned trial court committed a serious error in holding that the disputed property is not a residential property but is `a shop' and therefore, the provisions of the Act are not applicable.

For deciding the question as to whether the disputed property is a residential premises or a shop, the evidence produced by the parties has to be looked into.

PW.1 Santosh Kumar though has denied the fact that Kanwar Lal was running a shop before purchasing the same but has not disputed the fact that the property is situated in main market of Sunel town where the premises are being used for both the purposes viz. residential and commercial. PW.2 Bala Ram in his statement has clearly stated that Bhawani Shankar was running a tailoring shop in the ground floor of the premises. He has also admitted that Kanwar Lal was running a tea shop in the premises before purchasing the same. He has also deposed that earlier wife of Moti Lal was living in the premises and after that the premises was being used as shop.

As against this, D.W.1 Kanwar Lal has deposed that earlier he was tenant of Kamla Bai and was running a tea shop in the ground floor of the disputed premises and used to keep his articles on the first floor. D.W.2 Jagannath has also deposed that the lower portion of disputed premises was being used as shop and the upper portion was being used for keeping the articles. He has also deposed that the disputed premises is situated in main bazar and there is no residential premises in the locality. D.W.3 Bhagwati Prasad has deposed that Kanwar Lal was running hotel in the disputed premises since last 20-25 years and the another portion belonging to Ram Narayan was being used for running a General Store. D.W.4 Ram Chandra has also

deposed that the lower portion of the property of Kamla Bai was a shop and earlier to defendant Kanwar Lal, Bhawani Shankar was running his tailoring shop in the same and Kanwar Lal was running a tea shop in the same for last 20-25 years and the upper portion of the property was being used for keeping the goods.

Thus, from the evidence of the parties it is clear that the disputed property is situated in main bazar of Sunel town and there are shops in the lower portions of the houses and therefore, from the evidence produced by the defendant, defendant Kanwar Lal has been able to prove this fact beyond doubt that the disputed property is a shop and the same was being used as a shop before the same was sold to defendant Kanwar Lal. Therefore, in view of restrictions enumerated in Section 5(1)(a) of the Act, plaintiff appellants cannot claim right of pre emption. The finding recorded by the trial court on this issue is based on proper appreciation of the evidence available on record which is supported by various pronouncements of High Courts as well as of the Supreme Court.

For the discussions above, the first appeal fails and is hereby dismissed with no orders as to cost.

(K.C.Sharma),J.

Bairwa